Tiong Hung Ming v Kalimantan Hardwood Sdn Bhd

HIGH COURT (SIBU) — SUIT NO 58 OF 1991
STEVE SHIM J
15 MAY 1993

Civil Procedure *— Appeal — Admissibility of affidavit made after trial*

Civil Procedure *— Summary judgment — Contract — Non-payment for work done — Whether breach on plaintiff's part — Whether defendant had waived breach*

Contract *— Breach — Waiver — Whether defendant had waived alleged breaches by conduct — Whether time of the essence — Failure to set new time limit*

Evidence *— Documentary evidence — Letters — Allegations contained in plaintiff's letter not denied in defendant's reply — Whether facts deemed admitted*

The plaintiff had entered into an agreement ('the agreement') with the defendants to carry out construction work at the defendants' sawmill site. He claimed that the defendants' representatives had avoided payments which were validly due to him. The defendants argued that payment had not been made because the plaintiff had not complied with the conditions in the letter of credit ('THM–4') opened in his favour, which were that the plaintiff's invoices had to be counter-signed by the defendants' representatives and the plaintiff was to provide a surveyor's report certifying that the land had been levelled to a certain height. The defendants also argued that the plaintiff had breached the agreement by not using proper materials and by delaying completion of the works. The plaintiff contended that the defendants had waived the alleged breaches in the light of THM–4 and a letter dated 10 July 1991 ('THM–12') which purported to terminate the agreement due to numerous stoppages resulting in a three-month delay in the defendants' project. He also alleged that the defendants' representatives had refused to sign the relevant invoices although the conditions had been satisfied. The defendants counterclaimed by alleging failure on the plaintiff's part to complete all the construction work.

The plaintiff applied for summary judgment under O 14 of the Rules of the High Court 1980 for, inter alia: (a) RM348,545.98, or alternatively, RM304,151; and (b) further or in the alternative, for RM87,573.50. The senior assistant registrar gave judgment against the defendants for RM87,573.50 with interest and unconditional leave to defend on the balance sum. The plaintiff appealed against the decision that there was a triable issue in respect of prayer (a).

A preliminary issue before the court was whether the plaintiff could use the affidavit of one Wong Ting Yew made after the hearing and, therefore, have certain paragraphs in the defence and counterclaim struck out.

Held, allowing the appeal:

(1) There was no basis for the court to grant leave to the plaintiff to produce Wong's affidavit as the plaintiff could not show why he was unable to persuade Wong to make the affidavit earlier or that Wong was unavailable at all material times. Likewise, the application to strike out certain parts of the defence and counterclaim had no merit as it was based on Wong's affidavit.

(2) There was evidence to show that the defendants had, by their conduct, allowed the plaintiff to proceed and sanctioned the delay. They had waived the requirement in cl (5) of the agreement, that time was of the essence. THM–12 and THM–4 also constituted a clear indication that the defendants had waived the alleged breaches.

(3) Having waived the time limit stipulated in the agreement, the defendants were at liberty to fix a reasonable time for the completion of the work but this was not done. On the contrary, a letter dated 10 October 1991 seemed to indicate that in spite of the purported termination, the defendants continued to engage and deal with the plaintiff. In the circumstances, it could not be said with any certainty that the defendants, by THM–12, had terminated or intended to terminate the agreement.

(4) The evidence showed that the conditions for payment under THM–4 had been satisfied as, on a balance of probabilities, the plaintiff had in fact presented the relevant invoice to the defendants' representatives. In the correspondence between the parties, there was no denial of the allegation contained in the plaintiff's letter that the defendants' representative had confirmed that no rectification work was required. Therefore, it must reasonably be regarded as credible. The plaintiff was, therefore, entitled to summary judgment for RM304,151 payable under THM–4.

(5) However, the the allegations contained in the defendants' counterclaim were not without plausibility and, therefore, ought to be more fully ventilated at the trial.

[Bahasa Malaysia summary

Plaintif telah mengikat suatu perjanjian ('perjanjian itu') dengan defendan untuk menjalankan kerja pembinaan di tapak kilang papan defendan. Beliau menyatakan bahawa wakil defendan telah mengelak daripada membuat bayaran yang kena dibayar kepadanya. Defendan berhujah bahawa bayaran tidak dibuat kerana plaintif tidak mematuhi syarat di dalam surat kredit ('THM–4') yang telah dibuka memihak kepadanya, iaitu bahawa invois plaintif mesti ditandatangani balas oleh wakil defendan dan plaintif dikehendaki menyediakan suatu laporan juruukur yang mengesahkan bahawa tanah itu diratakan ke suatu ketinggian tertentu. Defendan juga berhujah bahawa plaintif telah memungkiri perjanjian itu kerana tidak menggunakan bahan

yang betul dan dengan melengahkan penyelesaian kerja tersebut. Plaintif menegaskan bahawa defendan telah menepikan kemungkiran yang dikatakan itu memandangkan THM–4 dan sepucuk surat yang bertarikh 10 Julai 1991 ('THM–12') yang kononnya berkesan untuk menamatkan perjanjian itu kerana berlakunya beberapa pemberhentian yang telah menyebabkan suatu kelengahan selama tiga bulan di dalam project defendan. Beliau mengatakan bahawa wakil defendan enggan menandatangani invois yang relevan walaupun syarat itu telah dipenuhi. Defendan telah menuntut balas dengan mengatakan bahawa plaintif telah gagal menyiapkan kesemua kerja pembinaan tersebut.

Plaintif telah memohon penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk, antara lain: (a) RM348,545.98, atau secara alternatif, RM304,151; dan (b) selanjutnya atau secara alternatif, untuk RM87,573.50. Penolong kanan pendaftar telah memberi penghakiman terhadap defendan untuk RM87,573.50 dengan faedah dan kebenaran tanpa syarat untuk membuat pembelaan atas jumlah baki. Plaintif telah membuat rayuan terhadap keputusan bahawa terdapat suatu isu yang perlu dibicarakan berkenaan dengan permohonan (a).

Suatu isu permulaan di hadapan mahkamah adalah sama ada plaintif boleh menggunakan afidavit seorang yang bernama Wong Ting Yew yang telah dibuat selepas perbicaraan dan dengan demikian membatalkan beberapa perenggan tertentu di dalam pembelaan dan tuntutan balas.

Diputuskan, membenarkan rayuan itu:

(1) Tidak ada alasan bagi mahkamah memberikan kebenaran kepada plaintif untuk mengemukakan afidavit Wong kerana plaintif tidak dapat menunjukkan kenapa beliau tidak berjaya memujuk Wong supaya membuat afidavit itu lebih awal atau bahawa Wong tidak boleh didapati pada setiap masa yang penting. Begitu juga, permohonan untuk membatalkan bahagian tertentu pembelaan dan tuntutan balas itu tidak mempunyai merit kerana ianya berdasarkan atas afidavit Wong.

(2) Terdapat keterangan untuk menunjukkan bahawa defendan, melalui kelakuan mereka, telah membenarkan plaintif meneruskan kerjanya dan memberi persetujuan kepada kelengahan itu. Mereka telah menepikan keperluan di dalam fasal (5) perjanjian itu, bahawa masa menjadi asas. THM–12 dan THM–4 juga merupakan tanda yang jelas bahawa defendan telah menepikan kemungkiran yang dikatakan itu.

(3) Dengan penepian had masa yang ditetapkan di dalam perjanjian itu, defendan bebas menetapkan masa yang munasabah bagi penyelesaian kerja itu tetapi ini tidak dilakukan. Sebaliknya, sepucuk surat yang bertarikh 10 Oktober 1991 kelihatan menunjukkan bahawa meskipun terdapat penamatan yang dikatakan itu, defendan terus menggaji dan berurus dengan

plaintif. Di dalam keadaan sedemikian, tidak boleh dikatakan dengan sebarang kepastian bahawa defendan, melalui THM–12, telah menamatkan atau ingin menamatkan perjanjian itu.

(4) Keterangan menunjukkan bahawa syarat pembayaran di bawah THM–4 telah dipenuhi kerana, atas imbangan kebarangkalian, plaintif telah pada hakikatnya mengemukakan invois yang relevan kepada wakil defendan. Di dalam surat-menyurat antara pihak-pihak, tidak terdapat sebarang penafian tentang pengataan plaintif bahawa wakil defendan telah mengesahkan bahawa kerja pembaikan tidak perlu dijalankan. Oleh itu, ia dengan munasabah mesti dianggap sebagai boleh dipercayai. Oleh yang demikian, plaintif berhak mendapatkan penghakiman terus bagi jumlah RM304,151 yang perlu dibayar di bawah THM–4.

(5) Bagaimanapun, pengataan yang terkandung di dalam tuntutan balas defendan nampaknya boleh dipercayai dan dengan itu, perlu disuarakan dengan lebih penuh pada perbicaraan.]

[*Editorial Note*: The defendants' appeal to the Supreme Court vide Civil Appeal No 02–337–93 was struck out on 22 August 1994 on the ground that it was not properly brought as the notice of appeal had not been served on the plaintiff.]

Notes

For a case on admission of further affidavit evidence in appeals, see [1991] Mallal's Digest 192.

For cases on waiver of breach, see 3 *Mallal's Digest* (4th Ed) paras 1633–1638; [1989] Mallal's Digest 209; [1990] Mallal's Digest 188; [1992] Mallal's Digest 643; [1993] Mallal's Digest 448.

For cases on summary judgment for contracts, see 2 *Mallal's Digest* (4th Ed) paras 2201–2212; [1992] Mallal's Digest 373; [1993] Mallal's Digest 297.

Cases referred to

Charles Rickards v Oppenheim [1950] 1 All ER 420 (refd)
Evans v Bartlam [1937] AC 473; [1937] 2 All ER 654 (refd)
Sharikat Eastern Plastics Industry v Sharikat Lam Seng Trading [1972] 1 MLJ 21 (refd)
Webb v Hughes [1970] LR 10 Eq 281 (folld)
Wong Kup Sing v Jerau Rubber Estates Ltd [1969] 1 MLJ 245 (refd)

Legislation referred to

Contracts Act 1950 s 64

Dr Chew Peng Hui (*Battenberg & Talma*) for the plaintiff.
Arthur Lee (*Arthur Lee & Co*) for the defendants.

Cur Adv Vult

Steve Shim J: By an amended summons-in-chambers dated 3 July 1992, the plaintiff had applied to the senior assistant registrar ('the SAR') under O 14 for judgment to be entered against the defendants for, inter alia: (a) the sum of RM348,545.98 or alternatively, the sum of RM304,151 thereof; and (b) further in the alternative, for the sum of RM87,573.50 on admission contained in the defendants' letter, exh THM–14. Upon the conclusion of the hearing, the SAR ordered that judgment be entered against the defendants for the sum of RM87,573.50 with interest thereon at 8%pa with costs to be taxed and that the defendants be given unconditional leave to defend as regards the balance sum. Thereafter, by a notice dated 30 September 1992, the plaintiff had appealed against the decision of the SAR in holding that there was a triable issue in respect of prayer (a) above. The plaintiff indicated that he did not wish to appeal against the decision as regards prayer (b) aforesaid.

Before the hearing of the substantive appeal, the plaintiff had, by a summons-in-chambers dated 4 January 1993, applied for: (1) leave to use the affidavit of one Wong Ting Yew affirmed on 19 December 1992 for the purpose of appeal; and (2) that the counterclaim in paras 13A, 14(a) and 15(a) of the amended defence and counterclaim be struck off. In the circumstances, it became necessary to deal with this application first. In support, the plaintiff had filed an affidavit affirmed by him on 23 December 1992, wherein he deposed that at the hearing of his application for summary judgment before the SAR on 12 August 1992, he was unable to persuade one Wong Ting Yew, the executive director of Metrobrite Engineering Sdn Bhd, to make an affidavit with regard to his company's quotation to the defendants for works to be done to the jetty or wharf and that only since the completion of the hearing aforesaid, was he able to do so and that as a result, Wong Ting Yew had affirmed the affidavit marked as exh THM–3. No reason had been adduced as to why the plaintiff was not able to persuade Wong Ting Yew to make the affidavit, neither was there any indication that the deponent was unavailable at all material times, such as for example, he was overseas or otherwise indisposed, etc. Reading the contents of exh THM–3, there is nothing therein to indicate or suggest that the deponent was ever approached prior to 12 August 1992. It is interesting to note that the amended defence and counterclaim was filed on 21 July 1992 and, therefore, the plaintiff would have known of the stand taken by the defendants as from that date. I do not accept that any attempt or attempts had been made by the plaintiff to obtain an affidavit from Wong Ting Yew as he alleged. If he had, the relevant affidavit would have been provided for prior to the hearing before the SAR. In the circumstances, it could not be said that the affidavit evidence in question was not available or could not be obtained at the time of the hearing before the SAR. There is therefore no basis upon which this court could grant leave to the plaintiff to produce Wong Ting Yew's affidavit. Leave is therefore denied.

In the light of the conclusion I have taken above, I am bound to hold that the application of the plaintiff to strike off paras 13A, 14(a) and 15(a) of the amended defence and counterclaim has no merit whatsoever as the

affidavit of Wong Ting Yew, exh THM–3, upon which this application is based, cannot be adduced in evidence. The application is, therefore, dismissed accordingly.

I now come to the substantive appeal. It should first be noted that such an appeal is dealt with by way of an actual rehearing of the application which led to the order under appeal and the judge will treat the matter as though it comes before him for the first time. Nevertheless, the judge should give whatever weight it deserves to the decision of the SAR although he is in no way bound by it: see 1 *Supreme Court Practice 1991* at p 873, para 58/1/2; *Evans v Bartlam* [1937] AC 473; [1937] 2 All ER 654.

The plaintiff, as I have said, has applied under O 14 for summary judgment in the sum of RM348,545.98 or alternatively, the sum of RM304,151 or in the further alternative, the sum of RM87,573.50. The plaintiff's case, as disclosed in the supporting affidavits, can be briefly stated herein: that by a written agreement dated 2 October 1990 made between the plaintiff and defendants, the defendants were to engage the plaintiff as a contractor to carry out certain works at their sawmill site at Parit Illir, Sarikei, comprising: (a) the construction and completion of a reinforced concrete jetty; (b) sandfilling of the site including the construction of an access road; and (c) the construction of earth bunds around the sandfilled areas; that works on (a) and (b) above had been completed and payments effected accordingly; that the sandfilling works were carried out in accordance with the instructions of the defendants' site representatives, namely, Lee Kim Joo and Raymond Wong; that by a letter dated 10 July 1991, the defendants informed the plaintiff they would engage a surveyor to check on the extent of the sandfilling carried out by the plaintiff with a view to making payments accordingly; that pursuant to the said letter, the defendants' surveyor, the Survey Development Service of Sarikei, surveyed the site on 13 July 1991 and was able to determine that a total area of 10.86 acres had been sandfilled; that based on the assessment by the said surveyor, the defendants, through a company called Weeluk Corp Sdn Bhd of Kota Kinabalu, opened a letter of credit through Chung Khiaw Bank Ltd, Singapore for the sum of RM304,151 in favour of the plaintiff but subject to certain conditions stated therein; that, however, the said letter of credit was allowed to expire because of the refusal of the defendants' representatives to sign the relevant invoices. The plaintiff alleged that the defendants were trying to avoid payments which were validly due to him.

In resisting the application, the defendants have filed two amended affidavits-in-opposition, one by David Wong, a director of the defendants and the other by William Ting, their manager. In the amended defence and counterclaim, the defendants have alleged, in essence, that they are not liable to the plaintiff for the sum of RM348,545.98 as claimed because of breaches by the plaintiff of the agreement dated 2 October 1990 made between them. This is the agreement marked exh THM–1. More specifically, they are alleging that the plaintiff had failed to complete the sandfilling operations in accordance with the representations and terms of the said agreement. These have been repeated in the defence as follows:

(a) Carrying out the sandfilling operations with black sand instead of brown riverine sand. A

(b) Failing to remove debris and rubbish from the black sand used for the sandfilling operation.

(c) Failing to complete the sandfilling operations within the time contracted, thereby causing the defendants delay in completing the building up of their sawmill for sawmilling operations. B

(d) Failing to compact the sandfilled areas.

The affidavits of David Wong and William Ting have expanded on these issues. They allege that at a meeting at Tanahmas Hotel, Sibu, sometime in August or September 1990, the plaintiff had orally represented to the C defendants' representatives that: (a) brown washed riverine sand would be used for sandfilling operations; and (b) the sandfilling operations would be completed, at the most, within five months from the date of agreement. According to them, it was on the basis of these representations that they, the defendants, agreed to accept the high quotations given by the plaintiff which were subsequently incorporated in the agreement, exh THM–1. D

In this appeal, the main thrust of Dr Chew's submission is this: assuming the allegations raised by the defendants to be true, namely, allegations relating to: (a) that the plaintiff was in breach of an oral precontractual representation to use brown washed riverine sand instead of black sand; and (b) that there was a failure on the part of the plaintiff E to complete the sandfilling operations within the time stipulated in the agreement, exh THM–1, that notwithstanding such allegations, there is still no defence to the plaintiff's claim. He relies on s 64 of the Contracts Act 1950, which stipulates:

> Every promisee may dispense with or remit, wholly or in part, the performance F of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

It is his contention that the defendants had dispensed with or waived the alleged breaches of the plaintiff's in the light of the following documents, namely, the letter dated 10 July 1991, exh THM–12, and the letter of G credit dated 10 August 1991, exh THM–4. It is therefore pertinent to examine these documents in some detail. Now, the letter, exh THM–12, was written by Raymond Wong, the general manager of the defendants, and addressed to the plaintiff and it states:

> Re: Sandfilling at our proposed sawmill in Sarikei H
>
> After due consideration, we have decided that we can no longer employ you as our sandfilling contractor. Your numerous stoppages have caused us to delay the implementation of our project. Thus, please stop all sandfilling works forthwith. We shall engage a surveyor to verify the extent of sandfilling prior to our releasing any payments to you. Please arrange for your representative to be present during the survey. I

At the outset, I think it significant to state that the said letter relates to sandfilling works contracted to be done by the plaintiff in accordance with the agreement of 2 October 1991, exh THM–1. It is a letter issued by the

defendants to the plaintiff purporting to terminate the sandfilling operations conducted by the plaintiff due to numerous stoppages resulting in delay in the implementation of the defendants' project. It should perhaps be noted that under the agreement, exh THM–1, more particularly cl (5) therein, the plaintiff was required to complete the sandfilling works within four months of completion of site clearing works, and the site clearing works were undertaken by the plaintiff under another agreement dated 12 October 1990 between the plaintiff and the defendants. The plaintiff was required to complete the site clearing works within two months of the said agreement. This would mean that the plaintiff should complete the clearing works on or about 12 December 1990 and thereafter be required to commence sandfilling operations on the site and to complete them by 12 April 1991. However, from the evidence disclosed in the affidavits, it would appear that the plaintiff was still doing sandfilling works at the time the letter, exh THM–12, was issued. Up to that time, there would have been a delay of about three months.

Now, there was a letter dated 28 January 1991, exh DW2, from the defendants to the plaintiff complaining of, among other things, a slow-down in the construction of the jetty and reminding the plaintiff to compact the sandfilled areas. The defendants have also produced another letter dated 6 June 1991, exh DW2, which they wrote to the plaintiff and it states:

> Re: Sandfilling at our sawmill site in Sarikei
>
> It has come to our attention that your sub-contractor has continued to use 'black' sand to fill our land despite our warning not to do so. Please make sure that only brown riverine sand devoid of any organic matter is used starting immediately. Otherwise, we will have no choice but to terminate the sandfilling contract and withhold all payments.

This letter, it should be noted, was issued about two months after the expiry of the agreement, exh THM–1. There was no indication or suggestion at that point in time that the defendants intended to terminate the agreement on account of delay although they had given warning of termination if the plaintiff continued to use black sand as opposed to brown riverine sand. Subsequently, the defendants issued a letter, exh THM–12, purporting to terminate the said agreement on account of 'numerous stoppages' committed by the plaintiff concerning the sandfilling works assigned to him, thereby causing delay in the implementation of the defendants' sawmill project. There was no mention in exh THM–12, that the defendants were unhappy about the use of black sand as in the earlier letter, exh D3, nor was there any further complaint about the slow progress of construction in respect of the jetty or failure to compact the sandfilled areas raised in their letter, exh DW2. It is reasonable to assume that these matters had by then been fully and satisfactorily rectified; for if they were not, they would conceivably have been raised again in the defendants' letter, exh THM–12, or be specifically referred to therein but they were not. It seems clear, on the face of the letter, exh THM–12, that the defendants purported to terminate the agreement, exh THM–1, because of delay arising from stoppages in the sandfilling operations of the plaintiff. It is unclear as to

why there were stoppages but they could be related to the 'landas' season at the time as alleged by the plaintiff although I would not discount completely the possibility that it could also be due to the time taken by the plaintiff to rectify the complaints raised in the defendants' letters, exhs DW2 and DW3. A

In any event, there was obviously a delay of some three months, as I have said, in the completion of the sandfilling project, thereby breaching the agreement, exh THM–1, in particular cl (5) therein. Under that clause, time was made of the essence of the agreement. In this connection, it is, I think, not inappropriate to refer to the dictum of Sir R Malins VC in *Webb v Hughes* (1870) LR 10 Eq 281 [at p 286] which was cited with approval in *Sharikat Eastern Plastics Industry v Sharikat Lam Seng Trading* [1972] 1 MLJ 21 which reads [at p 22]: B C

> But if time be made the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract. But, on the other hand, it must be borne in mind that a purchaser is not bound to wait an indefinite time; and if he finds, while the negotiations are going on, that a long time will elapse before the contract can be completed, he may in a reasonable manner give notice to the vendor, and fix a period at which the business is to be terminated. D

The above dictum was also approved by Raja Azlan Shah J in *Wong Kup Sing v Jerau Rubber Estates Ltd* [1969] 1 MLJ 245. Although the cases cited above related to contracts of sale, the same principle would seem to apply to contracts for work and labour: see *Charles Rickards Ltd v Oppenheim* [1950] 1 All ER 420. The law as to contracts for the performance of work is stated in 3 *Halsbury's Laws of England* (Hailsham Ed) at pp 220–222. At p 222, para 380, the law is stated thus: E F

> In cases where time has not been made of the essence of the contract or where, although time originally was made of the essence of the contract, the time so fixed for completion has ceased to be applicable by reason of waiver or otherwise, the employer has still a right by notice to fix a reasonable time for the completion of the work, and, in case the contract does not complete by that time, to dismiss the contract, just as a vendor would be entitled to rescind the contract in the case of a contract for sale of land. G

In the light of the above dicta, what then is the position in our case? Here, there is evidence to show that the defendants, notwithstanding the delay of which they know or must be taken to know, had allowed the plaintiff to proceed with the sandfilling works by actively and consciously conducting themselves in a manner which could only be construed as sanctioning the delay and thus in effect dispensing with or waiving the requirement stipulated in cl (5) of the agreement, exh THM–1. In the circumstances, I am therefore inclined to accept Dr Chew's proposition that the letters, exhs THM–4 and THM–12, constituted a clear indication that the defendants had dispensed or waived the breaches alleged to have been committed by the plaintiff; breaches which, according to the defendants, resulted in the delay arising from stoppages in the sandfilling works of the H I

plaintiff. Having waived the said stipulation, the defendants would be at liberty to fix a reasonable time for the completion of the sandfilling works. However, nothing to this effect could be deduced from the defendants' conduct. On the contrary, the letter dated 10 October 1991, exh THM–14, seems to indicate that the defendants, in spite of the letter, exh THM–12, had continued to engage or deal with the plaintiff in sandfilling works. This is reflected in the following portion of the said letter, exh THM–14, which reads:

> (4) ... The average filled level through our site is RC = 3.265m that is 0.145m (5.7") above our requirement. Per our letter dated 13 August 1991 to you, we have given you notice to relevel the sand by 20 August 1991 as we want to fill up the land with gravel so that our forklift can use the land. You have ignored our notice, as a result we have to relevel part of the land in order for us to proceed with our project. We, therefore disagree with para 3 of your letter dated 25 September 1991.

In the circumstances, it could not be said, with any certainty, that the defendant, by their letter, exh THM–12, had terminated or intended to terminate the agreement, exh THM–1, made between them and the plaintiff.

It is, I think, against this backdrop, that the subsequent action and conduct of the defendants should next be examined. Now, the affidavit evidence shows that following the letter, exh THM–12, the defendants engaged an independent surveyor, the Survey Development Service of Sarikei, to check on the extent of sandfilling carried out by the plaintiff with a view to payment out accordingly. The said surveyor thereupon conducted the check and ascertained that the total area sandfilled by the plaintiff was 10.86 acres. This is reflected in the summary sheet, exh THM–3, made by the surveyor. These facts were not disputed. Nor was it disputed that based on this document, the defendants thereafter, through a company called Weeluk Corp Sdn Bhd, Kota Kinabalu, opened a letter of credit dated 10 August 1991, exh THM–4, through Chung Khiaw Bank Ltd, Singapore, for the sum of RM304,151 in favour of the plaintiff subject to certain special conditions stated therein. Thus, on the face of the said letter of credit, there could be no question but that the sum of RM304,151 was to be paid out in relation to the 10.86 acres of land which the independent surveyor engaged by the defendants themselves, had ascertained to have been sandfilled by the plaintiff. However, the defendants had imposed certain special conditions for payment out. These are as follows:

> (1) All banking charges (except LC opening charges) are for account of beneficiary.
>
> (2) Invoices made out to Chung Khiaw Bank Ltd, Kota Kinabalu, for account of Weeluk Corp Sdn Bhd must be counter-signed by the following persons:
>
> (i) Mr William Ting (Malaysian I/C K818863)
>
> (ii) Mr Raymond Wong (Singapore Passport No 1181021.G)
>
> whose signatures must be verified by the negotiating bank.

(3) Beneficiary is to provide a surveyor's report certifying that the 10.86 acres of land have been levelled to two feet (2') above high tide level.

It is the defendants' case that the plaintiff had wilfully defaulted in complying with conditions 2 and 3 above, as a result of which payment in the sum stated therein could not be effected to him. In respect of condition 2, the plaintiff had responded that he had in fact submitted an invoice dated 19 September 1991, exh THM–17, to Mr Raymond Wong and Mr William Ting who were, at the material time, employees of the defendants, but these persons had refused to counter-sign it. This is also reflected in the plaintiff's letter dated 25 September 1991, exh THM–16, addressed to the defendants, the relevant paragraph therein states:

> We had on 21 September 1991 submitted our invoice dated 19 September 1991 as required by the LC to your Raymond Wong together with the surveyor's levelling report that was carried out in July 1991 for his certification as he is one of the nominated signatories for the invoice for the bank to release payment.
>
> It is understood that until now both your Mr Raymond Wong and Mr William Ting (both are named signatory for the invoice for the bank to release payment) refused to sign our invoice for release of payment.
>
> As the LC expiry date is 29 September 1991, we appreciate your urgent action to certify on our invoice to reach the bank in time for payment. If we are not able to receive your co-operation to cash the amount as stipulated in your Chung Khiaw Bank Ltd LC No CKKB 91157 dated 10 August 1991 before the expiry date of 29 September 1991, we have no choice but to refer the matter to our legal adviser for further action.

There was apparently a reply to the above letter by the defendants as reflected in the letter dated 10 October 1991, exh THM–14, which was referred to earlier but I do not think there is anything therein which can be construed as denying the allegations contained above. In the letter, exh THM–14, the defendants merely gave certain reasons as to why they were unable to accept the plaintiff's claim of RM304,151 although they assessed the sum due to be RM87,573.50. It should also be noted that Mr Raymond Wong, an employee of the defendants, had not filed any affidavit in denial. Having regard to the circumstances, I am satisfied, on the balance of probabilities, that the plaintiff did in fact present the relevant invoice to the defendants' representatives but the latter had refused to sign. That being the position, it cannot be said that the plaintiff had failed to comply with condition 2 of the letter of credit, exh THM–4.

As regards condition 3 in the letter of credit, exh THM–4, the plaintiff in his affidavit-in-reply affirmed on 15 April 1992, made reference to a letter dated 25 September 1991, exh THM–16, which he wrote to the defendants, the relevant part of which states as follows:

> In a meeting between your Mr Raymond Wong and our Mr Tiong Hung Ming and Mr Law Yew Kiung on 21 September 1991 at your site in Parit Illir, Sarikei, we had briefed your Mr Raymond Wong that the site is only over-filled in average by 145mm (5.7") above your required level of 600mm (2' 0") above the highest tide level of reduced level 2.52m as compared to the average sandfill depth of 1.92m (6' 4"). By the way we had received

A confirmation from your Mr Raymond Wong that there is no relevelling work required for the sandfilling work. Also the whole sand filling site is already utilized extensively by your numerous factories, stockpiles and road work, thus making it impossible to carry out any relevelling work.

It would seem from the excerpt above that the defendants' representative B Raymond Wong had informed the plaintiff that no relevelling work was required; that furthermore, it would have been impossible to relevel the areas in which buildings and other structures had already been erected. In this connection, it should be noted that the defendants in their written reply, exh THM–14, had drawn attention to their previous letter dated 13 August 1991 purporting to give notice to the plaintiff to relevel the land C and that the said notice had not been complied with, as a result of which they had to relevel the site themselves. However, it was quite evident that the defendants did not, in the said letter, exh THM–14, deny the allegations contained in the plaintiffs' letter, exh THM–16, namely: (1) that Mr Raymond Wong, the defendants' site representative had stated that no D relevelling work was required for the sandfilled areas; and (2) that it was impossible to carry out any relevelling work due to the existence of factories, stockpiles, etc, being erected in the affected area. In my view, these are significant allegations which ought reasonably to have been resisted or denied by the defendants in their letter, exh THM–14, if untrue. In the absence of any specific denial, these allegations must reasonably be regarded E are credible. In the circumstances, I would accept the proposition that it would be utterly unfair and unreasonable to impose condition 3 in the letter of credit, exh THM–4.

For the reasons given, I hold that the plaintiff is entitled to the amount of RM304,151 as per the letter of credit, exh THM–4. I find that, F in so far as to matters relating to the sandfilling operations of the plaintiff are concerned, the defendants have not been able to satisfy the court that there is an issue or question in dispute which ought to be tried nor have they shown to my satisfaction that there is an arguable case. It seems to me to be a plain case which ought not to go to trial.

G In the course of resisting the plaintiff's application for summary judgment, the defendants have relied additionally on their counterclaim which deals substantially with the alleged failures on the part of the plaintiff to construct and complete the reinforced concrete wharf or jetty. In the original counterclaim, the more significant issues are pleaded in H paras 12.2 and 13. Paragraph 12.2 alleges that the plaintiff had failed to complete the reinforced concrete wharf or jetty in accordance with the specifications in the agreement, exh THM–1. These are particularized as: (a) failing to construct the stairs for the wharf and jetty; (b) failing to put a fender in front of the wharf and jetty; and (c) failing to put a 'dolphin' at the far end of the wharf and jetty. Paragraph 13 alleges damage caused I to the incomplete wharf and jetty when the plaintiff's barge negligently collided into it. In this connection, the defendants are claiming 'pecuniary loss to be assessed on cost of rectification works and cost of repairs on the wharf/jetty upon completion of the rectification work and repairs'.

It should be noted that the plaintiff subsequently, by a summons-in-chambers dated 29 April 1992, applied to amend the statement of claim. The court granted the application and at the same time allowed the defendants liberty to amend their defence and counterclaim upon receipt of the amended statement of claim. Accordingly, the defendants amended their counterclaim by adding para 13A which states:

> Further or in the alternative, the plaintiff has failed to complete and construct the said reinforced concrete wharf and jetty in accordance to normal engineering practice and, as a result thereof, has made the defendant liable to further costs and expenses to demolish and replace the said concrete reinforced wharf and jetty.
>
> Particulars
>
> The sum of RM380,000 being the cost quoted by Metrobrite Engineering Sdn Bhd as the cost of demolishing and reconstructing the said reinforced concrete wharf and jetty.

The plaintiff in his reply to the amended defence and counterclaim dated 30 September 1992 merely denied the allegations in question. Thereafter, the plaintiff, in an obvious attempt to reinforce his denial, applied by way of summons-in-chambers dated 4 January 1993, for leave to use the affidavit affirmed by one Wong Ting Yew. I dealt with this application in the earlier part of this judgment in which leave was denied. In the premises, the allegations of the defendants as regards the plaintiff's failure to construct and complete the wharf and jetty, etc, under the agreement, exh THM–1, are not without plausibility and, therefore, ought to be more fully ventilated at the trial.

In the circumstances, and for the reasons stated, I will order that judgment be given to the plaintiff in the sum of RM304,151 with costs until the trial of the counterclaim in respect of the allegations aforesaid.

Appeal allowed.

Reported by Anne Khoo